

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

TRAVIS WAYNE TOLLEY,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 7:19-cv-00863
)	
BEN CALDWELL, <i>et al.</i> ,)	By: Elizabeth K. Dillon
)	United States District Judge
Defendants.)	

MEMORANDUM OPINION AND ORDER

Before the court are separate motions to dismiss filed by each of the three defendants in this action: Detective Alan W. Buzzard (Dkt. No. 70), Virginia State Police Special Agent Ben Caldwell (Dkt. No. 73), and Officer Greg Gardner (Dkt. No. 75.) Plaintiff Travis Wayne Tolley alleges three causes of action: (1) unlawful search and seizure, (2) unlawful detention, and (3) unlawful limitation of religious freedom (free exercise). (Third Am. Compl., Dkt. No. 69; Proposed Fourth Am. Compl., Dkt. No. 90-1.) Defendants Buzzard and Gardner move to dismiss the second and third causes of action. Defendant Caldwell moves to dismiss all three causes of action. The court held a hearing on the motions on February 12, 2021. (Dkt. No. 92.) Following the hearing, the parties stipulated to the dismissal with prejudice of third cause of action regarding religious freedom in the third amended complaint and the proposed fourth amended complaint. (Dkt. No. 93.)

For the reasons stated on the record at the hearing, the court found that Tolley's allegations are sufficient to state a claim under the Fourth Amendment regarding search and seizure. The only question the court took under advisement was whether the court should examine the claim set

forth in the first cause of action incident by incident. First, Caldwell's motion sought to dismiss the first cause of action in its entirety. Second, "[a] plain reading of Rule 12(b)(6) indicates that the rule may be used only to dismiss a 'claim' in its entirety." *Charles v. Front Royal Volunteer Fire & Rescue Dep't, Inc.*, 21 F. Supp. 3d 620, 629 (W.D. Va. 2014) (quoting *Janis v. Nelson*, No. CR 09-5019-KES, 2009 WL 4505935, at *7 (D.S.D. Nov. 24, 2009) (citations omitted)). Thus, Caldwell's motion will be denied with respect to the first cause of action.

For the reasons stated on the record at the hearing, defendants' motions will be denied with respect to the second cause of action – unlawful detention.

The third cause of action has now been dismissed with prejudice by joint stipulation, so the only other motion pending is plaintiff's motion for leave to file a fourth amended complaint. Defendants do not oppose this motion, which will be granted. By granting leave to file a fourth amended complaint, the court does not reinstate any claims dismissed with respect to the third amended complaint. The only claims that plaintiff may proceed with in the fourth amended complaint are the claims the court did not dismiss when addressing the third amended complaint: plaintiff's first cause of action for unlawful search and seizure against defendants Buzzard, Caldwell, and Gardner, and plaintiff's second cause of action for unlawful detention against defendants Buzzard, Caldwell, and Gardner.¹

It is HEREBY ORDERED that defendants' motions to dismiss (Dkt. Nos. 70, 73, 75) are GRANTED IN PART and DENIED IN PART, consistent with the foregoing.

It is FURTHER ORDERED that plaintiff's motion for leave to file a fourth amended complaint (Dkt. No. 90) is GRANTED.

¹ The stipulation of dismissal as to count three applies to the fourth amended complaint. (Dkt. No. 93.)

The clerk is directed to send a copy of the memorandum opinion and order to all counsel of record.

Entered: June 15, 2021.

/s/ Elizabeth K. Dillon

Elizabeth K. Dillon
United States District Judge